

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

JAMES CARL GRINDSTAFF,

Debtor.

No. 99-22105
Chapter 7

M E M O R A N D U M

APPEARANCES :

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This chapter 7 case came before the court for trial on February 23, 2000, upon the United States trustee's motion to dismiss pursuant to 11 U.S.C. § 707(b) for "substantial abuse." For the reasons set forth below, the motion will be denied. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(A).

I.

The debtor, James Carl Grindstaff, filed a petition, initiating this case on August 24, 1999. In his schedules of liabilities, the debtor listed total debts of \$41,531, including \$23,431 in unsecured debts and \$18,100 of debt denominated as secured although collateralized by only \$1,500 in assets. The debtor's schedules of assets listed \$5,000 in real property consisting of a time share in Cancun, Mexico and \$7,725 in personalty, including a one-half interest in a 1991 mobile home, a 1987 Oldsmobile Calais automobile, \$2,000 in a 401(k) retirement account and various household goods. In Schedules I and II, the debtor noted that he had been employed by Bosch in Johnson City, Tennessee for fourteen years, that his gross monthly income was \$2,148.46, his net monthly income was \$1,619.37, and his monthly expenses were \$1,505. In response to question no. 1 on the statement of financial affairs, the debtor indicated that his gross income in 1997 and 1998 was \$52,000 and

\$43,000 respectively and that prior to the bankruptcy filing, his gross income for 1999 totaled \$23,564.

On September 24, 1999, the chapter 7 trustee filed a report of no distribution and abandonment of property, abandoning all interest in property of the estate. Subsequently, after receiving an extension of time in which to do so, the United States trustee filed the present motion to dismiss, alleging that the debtor's income was sufficiently stable to make a significant payment to his creditors through implementation of a chapter 13 plan. The trustee further alleged in the motion that the debtor could reduce his expenses without being deprived of necessities. The trustee noted that Schedule J listed housing expenses of \$400 per month plus utilities "when in fact [the debtor] lives with his mother in a mobile home he jointly owns with her and does not have those expenses."

On January 18, 2000, the debtor filed amended Schedules I and J along with a response to the motion to dismiss. Attached to the response was a payroll stub indicating that the debtor's annual gross earnings through December 22, 1999, totaled \$43,017.60. In his response, the debtor explained that his 1999 gross pay included overtime pay of approximately \$13,000, for which he worked 42 out of 52 Saturdays and 40 out of 52 Sundays in addition to the normal work week, and that he worked

approximately the same amount of overtime in 1998 and 1997 in an attempt to keep his payments to creditors current. According to the debtor, he only filed chapter 7 when he realized that he could not continue to work seven days a week to make minimum payments to his creditors. Anticipating a five-day work week in the future, the debtor listed monthly income based on a 40-hour work week in his original Schedule I. However, upon realizing that this reduced work schedule would not provide him sufficient income to cover his living expenses, the debtor filed an amended Schedule I which reflects overtime income from working every other weekend although he noted that such overtime is not guaranteed. The debtor further asserted in his response that his amended Schedule J listed his new living expenses because he had moved closer to his place of employment and set forth an anticipated monthly expense for the purchase of a newer vehicle due to the age and mileage on his present automobile.

At the trial in this matter, the debtor was the only witness. He testified that he and his former wife separated in July 1997 and then divorced in December 1997 after nine years of marriage and two children, ages seven and two at the time of the divorce. As part of the divorce settlement, the debtor was required to assume \$14,000 of his spouse's debts. He was also required to pay child support although that obligation ceased

when his former wife remarried and her new husband adopted the children. The debtor testified that after his divorce, he got behind in his bills and behind on payments for a truck he had purchased, often borrowing money to catch up his payments. Prior to filing for bankruptcy relief, the debtor sought and received financial counseling from Consumer Credit Counseling, but testified that they were able to provide him little relief since they could only reduce his payments by \$100 per month.

The debtor, who is 34 years of age, currently resides in Johnson City, having moved there permanently the first of February 2000. Prior to his move, the debtor lived for two and one-half years in Mountain City, Tennessee with his mother. The debtor testified that the mobile home in which he and his mother resided was titled in both of their names, but that she actually owned the mobile home because she had paid for it. The debtor stated that while living with his mother, he paid the \$100 lot rent and reimbursed his mother for utilities. The debtor testified that he moved in order to be closer to his job since it was a 42-mile round trip from his mother's to his place of employment in Johnson City, and the drive often proved difficult during the winter when bad weather was a problem.

The debtor testified that his hourly wage is \$13.43 and that he earns time and one-half for Saturday overtime and double pay

for Sunday overtime. According to his tax returns as stipulated by the parties, the debtor's income for 1996, 1997, 1998, and 1999 respectively was \$37,968.80, \$45,901, \$42,483, and \$41,666.¹

In accordance with his assertions in his response to the trustee's motion to dismiss, the debtor testified that in the original budget which he filed at the time he commenced this bankruptcy, he listed only his "straight" time pay because he did not believe that he could continue working seven days a week which he had been doing for the past three years and because overtime hours were not guaranteed by his employer. The debtor also testified that notwithstanding his amended Schedule I which anticipates overtime income from working every other weekend, he has been able to work very little overtime thus far in 2000 because his employer has not had enough work for him. The debtor stated that he has only worked two weekends since the beginning of the year.

The majority of testimony elicited by the attorney for the United States trustee pertained to the debtor's budgeted income and expenses and perceived discrepancies between the debtor's stated and actual expenses. In his original Schedule J, the debtor listed the following expenses: \$400 for rent, \$185 for

¹This amount is inconsistent with the debtor's December 22, 1999 payroll stub which indicated that the debtor's gross earnings in 1999 through December 22 totaled \$43,017.60.

utilities, \$20 for home maintenance, \$200 for food, \$100 for clothing, \$20 for laundry and dry cleaning, \$50 for dental and medical expenses, \$200 for transportation, \$100 for recreation, \$80 for automobile insurance, and \$150 for an automobile payment. In his amended budget, the debtor lists gross monthly income of \$3,143.78, net income of \$2,060.85, and monthly expenses of \$1,860. Included in the deductions from gross monthly income is \$311.61 for uniforms, contribution to a 401(k) retirement account, and repayment of a 401(k) loan. The debtor's amended budgeted expenses, in addition to the expenses listed in the original Schedule J, include cable of \$25 per month, an increase in transportation from \$200 to \$250, renter's insurance of \$30, an increase in auto insurance from \$80 to \$150, property taxes of \$25,² and an increase in the automobile payment from \$150 to \$300 per month.

With respect to the monthly deduction of \$311.61 from his gross pay, the debtor explained that he is contributing \$30 a week to his 401(k) and that shortly after his bankruptcy case was filed, he borrowed \$3,000 from his 401(k) account because he had been arrested and charged with DUI and needed the money to pay an attorney and expenses related to that matter which

²No explanation was offered as to why the debtor is responsible for property taxes.

totaled approximately \$5,000. He is presently repaying the 401(k) loan at the rate of \$180 to \$200 per month.

With respect to his amended expenses, the debtor testified that he currently spends \$60 to \$100 a week on gas and oil and that he drives to see his mother three days per week because he is an only child and tries to help his mother when he can. Only \$150 of the budgeted \$300 per month automobile payment is being spent now. The larger amount is what the debtor expects to pay when he purchases a newer vehicle since his 1987 Calais automobile has 185,000 miles on it. The debtor testified that he scheduled an increase in his auto insurance because when he purchases a new vehicle he will have to buy collision insurance which will be extremely high since he is a high risk driver in light of his DUI conviction.

The trustee observed that based on his 1999 income, the debtor has gross monthly income of \$3,472, rather than either the original scheduled amount of \$2,148.46 or the amended amount of \$3,143.78. The trustee noted that when this bankruptcy case was commenced, the debtor did not pay \$400 in rent since he lived with his mother. The trustee also questioned the debtor's high transportation expenses.

II.

Section 707(b) of the Bankruptcy Code provides in pertinent part as follows:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

"Substantial abuse" as used in § 707(b) is not defined in the Bankruptcy Code. *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). In the only decision by the Sixth Circuit Court of Appeals on the subject, the court observed that courts construing this phrase "have generally concluded that, in seeking to curb 'substantial abuse,' Congress meant to deny Chapter 7 relief to the dishonest or non-needy debtor." *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)).

In determining whether to apply § 707(b) to an individual debtor, then, a court should ascertain from the totality of the circumstances whether he is merely seeking an advantage over his creditors, or instead is "honest," in the sense that his relationship with his creditors has been marked by essentially honorable and undeceptive dealings, and whether he is "needy" in the sense that his financial predicament warrants the discharge of his debts in exchange for liquidation of his assets.

Id. at 126. Thus, the rationale of *Krohn* is that "[s]ubstantial

abuse can be predicated upon either lack of honesty or want of need." *Id.* The trustee asserts that both circumstances exist in the present case. Accordingly, the court will consider the evidence on both grounds.

III.

With respect to the first basis, lack of honesty, the Sixth Circuit noted in *Krohn* that although it is not possible to list all of the factors that may be relevant to this inquiry, "[c]ounted among them, however, would surely be the debtor's good faith and candor in filing schedules and other documents, whether he has engaged in 'eve of bankruptcy purchases,' and whether he was forced into Chapter 7 by unforeseen or catastrophic events." *Id.*

The trustee argues that the debtor in this case understated his income and overstated his expenses in completing his schedules. She notes that his gross income for the last three years has exceeded \$40,000, yet the gross monthly income listed by the debtor in his original budget translates into an annual income of only \$25,781.52, even though the debtor still has the same job. The trustee notes that the debtor listed a monthly rent or home mortgage payment of \$400 at the time of the bankruptcy filing when in fact he lived with his mother and only

paid lot rent of \$100 per month. The trustee cites the debtor's move which increased his housing expense, his amended transportation expense of \$250 even though he currently lives less than 10 minutes from work, and the budgeted \$300 per month for an anticipated auto payment as dishonest efforts by the debtor to inflate his expenses to the detriment of his creditors. The trustee also notes that the debtor failed to list in his original Schedule I his \$30 per week contribution to his 401(k) retirement account and listed the account as having a value of \$2,000 when in fact the account was worth approximately \$4,000.

The debtor testified that the reason his gross monthly income on his schedules was less than previous years was because he no longer planned to work the overtime which he had consistently worked the previous three years and because continued overtime was not guaranteed by his employer. Nonetheless, it appears that sometime after commencing his bankruptcy case in August 1999, the debtor's overtime increased, with almost \$18,000 of his 1999 income of \$41,666 having been earned in the last four months of the year, when the debtor worked almost every day. The debtor explained that this increase was due to the debtor's employer setting up a new assembly line and that he is obligated by the union contract to

work overtime if requested by his employer.

Despite the discrepancy between the debtor's anticipated hours and what he actually worked, there was no evidence that the debtor knew at the time of the bankruptcy filing that this additional work would be forthcoming. Furthermore, the extensive overtime was only through the end of 1999 since the debtor testified that he has only worked two weekends of overtime this year. The lack of any intent to mislead is supported by the fact that the debtor fully disclosed his previous years' incomes in response to question no. 1 in the statement of financial affairs, alerting creditors that his past income was greater than what he was projecting for the future.

With respect to the misrepresentation of the debtor's monthly housing expense (listing it at \$400 per month when in fact he lived with his mother and only paid lot rent of \$100), the debtor explained that he planned to move and was simply anticipating what his rent would be when he moved as he later did. While no explanation was given for the debtor's failure to list the 401(k) deduction from his paycheck and to state the correct value of the 401(k) account, these deficiencies along with the anticipatory nature of the rent appear to be more a reflection of inattentive completion of the schedules rather than evidence of deceit.

As previously noted, the Sixth Circuit in *Krohn* directed that a bankruptcy court consider not only the debtor's good faith and candor in filing schedules, but also "whether [the debtor] has engaged in 'eve of bankruptcy purchases,' and whether he was forced into chapter 7 by unforeseen or catastrophic events." *Id.* In this regard, there was no evidence that the debtor made "eve of bankruptcy purchases." The debtor testified that all of his debts had been incurred at least six months to a year before he filed bankruptcy. Although there was no catastrophic event which forced the debtor into bankruptcy, the bankruptcy appears to have been the culmination of unsuccessful efforts by the debtor over a period of time to meet his obligations following his divorce. The debtor testified that he had worked overtime for three years in an attempt to keep up with his obligations, and when this became unduly burdensome, he consulted with consumer credit counseling.

Contrast In re Krohn, 886 F.2d at 127 ("At no point in the debtor's history, either before or after filing for chapter 7 relief, has the debtor shown a sincere resolve to repay his obligations and/or to reduce his monthly expenses."). Because consumer credit counseling was only able to provide minimal relief, the debtor sought bankruptcy relief. Accordingly, the court does not find from the evidence presented that the debtor

in this case has been dishonest in his dealings with his creditors. See *In re Krohn*, 886 F.2d at 128 (totality of circumstances "demonstrate an attempt to seek advantage over creditors"); *In re White*, 49 B.R. 869, 875 (Bankr. W.D.N.C. 1985)(Implicit in the term "substantial abuse" is "some type of an unfair advantage that is obtained by the Debtor because of his filing as against his creditors.").

The court next turns to the question of whether the debtor is in need of bankruptcy relief. With regard to this basis for dismissal under § 707(b), the Sixth Circuit Court of Appeals stated the following in *Krohn*:

Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future earnings. [Citations omitted.] That factor alone may be sufficient to warrant dismissal. For example, a court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease. Other factors relevant to need include whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.

In re Krohn, 886 F.2d at 126-27.

As proof in support of her argument that the debtor does not

need bankruptcy relief, the trustee points to the debtor's income over the last three years. She asserts that based on the previous years' income, and the expenses listed by the debtor in his original budget, the debtor would be able to pay 100% of his unsecured debt over 46 months at \$500 per month. Again, the trustee questions the need for the debtor's post-petition change of residence, his current transportation costs, and the anticipated monthly payments for a newer automobile. She also cites the 401(k) contribution and loan repayment as unnecessary expenses.

The trustee is correct in her assertion that \$500.00 per month over 46 months would pay almost all of the debtor's scheduled unsecured debt. However, the debtor also scheduled \$18,100.00 in secured debt and has since avoided the liens on all but \$4,600.00 of this debt, the latter being secured by the debtor's automobile and being paid at the rate of \$150 per month. To pay all of the debtor's obligations, excluding the \$4,600, i.e., \$37,931, would require monthly payments of \$1,025.86 over 36 months or \$692.18 over 60 months.

The evidence does not establish that the debtor in the present case is capable of making the necessary monthly payments of either of these amounts. Clearly, this is not a case where the debtor is enjoying an extravagant lifestyle. *Contrast In re*

Krohn, 886 F.2d at 125 (In the 1986 case, couple had \$700 per month budgeted for food due to wife's dislike for cooking and \$150 per month budgeted for clothing for wife's custom-made clothes. In the three months preceding trial, the debtors spent \$1,065.61 for dining out, lunch and recreation, \$355.06 for groceries, \$169.84 for cosmetics, \$66.49 for cigars, and \$671.99 for clothes.). The majority of the debtor's expenses were not out of line or inappropriate. The \$400 per month for rent is not excessive and the court does not fault the debtor for moving closer to his work even though the move increased the debtor's housing expense. See *In re Attanasio*, 218 B.R. 180, 209 (Bankr. N.D. Ala. 1998)("[T]o require the maintenance of an unusual living arrangement which had existed solely because of 'extraordinary efforts by the debtor' would be inequitable, and contrary to a fresh start."). Nor is it unreasonable to plan for the purchase of a newer vehicle, considering the fact that the debtor's automobile is thirteen years old, has 185,000 miles on it, and is, in the debtor's words, "worn-out." See *In re Zaleta*, 211 B.R. 178, 182 (Bankr. M.D. Pa. 1997)("future expenses are relevant to the debtor's ability to pay"); *In re Hill*, 1994 WL 738663 (Bankr. D. Idaho, Dec. 22, 1994)(substantial abuse not indicated where the debtors needed a car since their second car had been driven 150,000 miles).

Furthermore, it was not unreasonable for the debtor to base his income on only working overtime every other weekend since the opportunities for working overtime have been curtailed by the debtor's employer in 2000, overtime even when available is not guaranteed in the future, and it is unrealistic to expect the debtor to continue to work seven days per week. See *In re Attanasio*, 218 B.R. at 215 ("Wage and hour laws contemplate that a person works 40 hours per week"³ and "[s]ection 707(b) neither provides nor even suggests that a debtor must work beyond that amount for the benefit of creditors."); *In re Hampton*, 147 B.R. 130, 131 (Bankr. E.D. Ky. 1992)("[T]he Court believes it should not use any standard of previous earnings which is based upon extraordinary work efforts by the debtor when evaluating the ability of the debtors to fund a Chapter 13 plan when the Court

³The court in *Attanasio* observed:

Courts are divided when considering whether earnings received from working overtime hours, or from working a second part time job, should be factored into determining a debtor's prospective ability to pay. Some believe that a debtor's decision to reduce overtime hours or to quit a second job, even for health or family reasons, is a circumstance that suggest bad faith and weighs in favor of dismissal. [Footnote omitted.] The opposing view is that a debtor's decision to reduce overtime hours or to quit a second job is a personal decision, reasonably made, for any reason, but especially if made for the benefit of the debtor's health or the welfare of a family.

In re Attanasio, 218 B.R. at 214-15.

is determining whether there is substantial abuse pursuant to § 707(b).").

On the other hand, there is no doubt that the debtor could make some payment to creditors in a chapter 13 plan.⁴ His amended budget listed excess monthly income of \$200.85. Furthermore, the debtor's current repayment of his 401(k) loan at the rate of \$180 per month and his voluntary contributions to his 401(k) account of approximately \$100 per month are not necessities, considering the debtor's relatively young age. See *In re Watkins*, 216 B.R. 394, 396 (Bankr. W.D. Tex. 1997)(voluntary retirement contribution); *In re Shirley*, 2000 WL 150835 *4 (Bankr. N.D. Iowa 2000)(401(k) loan repayment)(both citing *Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d 775 (6th Cir. 1995)).

Based on the foregoing, it would appear that the debtor should be able to pay approximately \$480 per month to his creditors. In a chapter 13 plan, assuming 5% administrative fees and a \$1,000 attorney fee, this monthly payment would

⁴It has been held that in determining ability to pay, the court should "hypothesize the debtor's filing a chapter 13 and then to apply the 'projected disposable income' test of § 1325(b)(2)." *In re Stallman*, 198 B.R. 491, 495 (Bankr. W.D. Mich. 1996). This approach, however, has been criticized because it ignores the presumption in favor of granting chapter 7 relief. See *In re Tefertiller*, 104 B.R. 513, 514-15 (Bankr. N.D. Ga. 1989).

result in a 41% dividend to unsecured creditors in a 36-month plan and a 69% dividend in a 60-month plan.⁵ Are these percentages sufficient standing alone for the court to conclude that granting relief to the debtor would be a "substantial abuse" of chapter 7 within the meaning of § 707(b)?

Unfortunately, the Sixth Circuit in *Krohn* did not specify the level of repayment required in order to establish lack of need.⁶ Although the debtors in *Krohn* were denied chapter 7

⁵Monthly payments of \$480 in a 36-month plan total \$17,280. Subtracting 5% for administrative fees and \$1,000 for attorney fees equals \$15,416. Dividing \$15,416 by the debt of \$37,931 results in a dividend of 41%. Monthly payments of \$480 in a 60-month plan total \$28,800. Again, subtracting 5% for administrative fees and \$1,000 for attorney fees equals \$26,360. Dividing \$26,360 by the debt of \$37,931 results in a dividend of 69%.

⁶To be expected, the courts have varying opinions as to what amount of repayment constitutes an "ability to pay." Some courts conclude that a debtor must be able to repay 100% of unsecured debt within 36 months in order to arise to a level of substantial abuse. See, e.g., *In re Edwards*, 50 B.R. 933 (Bankr. S.D.N.Y. 1985). Other courts impose a less stringent test to determine the ability to pay. See, e.g., *In re Schmidt*, 200 B.R. 36 (Bankr. D. Neb. 1996)(substantial abuse indicated where the debtors could pay 25% of their unsecured debts over a period of 36 months); *In re Vianese*, 192 B.R. 61 (Bankr. N.D.N.Y. 1996)(substantial abuse indicated where the debtors, with elimination of unnecessary expenses, possibly could pay 19% of their unsecured debts over a period of 36 months); *In re Smurthwaite*, 149 B.R. 409 (Bankr. N.D. W. Va. 1992)(substantial abuse indicated where the debtor could pay 28% of his unsecured debts over a period of 36 months). From this court's review of the case law, the majority of courts appear to concur with the conclusion in *Higginbotham* that a debtor's ability to repay some

(continued...)

relief based on both lack of need and dishonesty, see *In re Krohn*, 886 F.2d at 128, the court did not calculate the amount or percentage of repayment of which the debtors were capable. In discussing the ability to pay, however, the Sixth Circuit cited as an example, a debtor whose "disposable income permits liquidation of his consumer debts **with relative ease.**" *Id.* at 127 (emphasis added). Similarly, the *Krohn* court stated that "[d]ismissal for substantial abuse is intended to 'uphold creditors' interests in obtaining repayment where such repayment **would not be a burden,**'" language which suggests a debtor who is easily capable of making significant and substantial repayment. *Id.* (quoting *In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988)(emphasis added)). While neither of these quoted phrases quantify the level of repayment required, they do suggest application of a liberal standard if ability to pay standing alone is to be the basis for the denial of chapter 7 relief. Presumably, because of this language, the vast majority of decisions by courts in the Sixth Circuit after *Krohn* have found substantial abuse only where the debtor is able to repay virtually all of his debt within a reasonable time, or an

⁶(...continued)
part of his debts does not per se bar him from chapter 7 relief. See *In re Higginbotham*, 111 B.R. 955, 964 (Bankr. N.D. Okla. 1990).

ability to repay a lesser, but still significant amount is coupled with other factors suggesting lack of honesty or good faith.⁷

⁷See *In re Reese*, 236 B.R. 371, 374 (Bankr. N.D. Ohio 1999)(refusing to find substantial abuse where debtor's unsecured creditors would receive less than 15% of their allowed claims); *In re Adams*, 206 B.R. 456, 462 (Bankr. M.D. Tenn. 1999)(Although evidence established that debtors had sufficient disposable income to pay at least 92% of unsecured debt in a 36-month plan, the court concluded no substantial abuse where there was a possibility that income of the debtors could decrease in the near future, one of the vehicles would need replacing, and there was no evidence of dishonesty); *In re Stallman*, 198 B.R. 491, 498 (Bankr. W.D. Mich. 1996)(court found substantial abuse where debtor, with a little "belt tightening," could pay some \$45,000 over three years on unsecured debts of \$45,562); *In re Messenger*, 178 B.R. 145, 150 (Bankr. N.D. Ohio 1995)(court adopted a repayment standard of payment in full of debtor's priority claims, attorney's fees, chapter 13 trustee fee and a 70 percent dividend to general unsecured creditors over 36 months); *In re Christie*, 172 B.R. 233, 237 (Bankr. N.D. Ohio 1994)(substantial abuse where debtor with only \$5,872.51 of unsecured debt, had budgeted \$250 per month for semi-annual vacation and \$50 monthly for gifts, and had been less than candid in completing her schedules); *In re Martens*, 171 B.R. 43, 46 (Bankr. N.D. Ohio 1994)(no substantial abuse where the debtor could only pay 11% of unsecured debt over five years); *In re Wilkinson*, 168 B.R. 626, 629 (Bankr. N.D. Ohio 1994)(substantial abuse where debtor could repay in 20 months only unreaffirmed debt); *In re McCormack*, 159 B.R. 491, 495 (Bankr. N.D. Ohio 1993)(lack of need where debtors had monthly excess income of \$1,252.92 which could be devoted to repayment of debt); *In re Hutton*, 158 B.R. 648, 650 (Bankr. E.D. Ky. 1993)(substantial abuse where debtors could repay all of their unsecured debt in less than three years); *In re Laury-Norvell*, 157 B.R. 14, 16 (Bankr. N.D. Ohio 1993)(evidence did not establish that debtor had the ability to repay a significant amount of her unsecured debt where her income was unstable, she worked on an "as-needed" basis, and her health prevented her from working overtime as in previous years); *In re Hampton*, 147 B.R. 130, 133 (Bankr. E.D. (continued...)

Although it is a close question, this court is unable to conclude that the percentage repayment of which the debtor is capable is sufficient standing alone to establish substantial abuse. In reaching this conclusion, the court gives great

⁷(...continued)

Ky. 1992)(in the absence of other factors, court could not conclude that ability of debtors to pay 5% of their unsecured debt over three years was substantial abuse); *In re Shepherd*, 147 B.R. 422, 425 (Bankr. N.D. Ohio 1992)(no substantial abuse established for debtor with very modest annual income of \$5,290.00 and unsecured debt of \$50,894.90); *In re Beles*, 135 B.R. 286, 288 (Bankr. S.D. Ohio 1991)(court stated that it could not conclude that debtors could liquidate their debts "with relative ease" even though they had excess monthly income of \$650 and unsecured debt of \$68,536, where debtors were in their mid-fifties and had made only modest provision for retirement and debt had been incurred through unemployment, health problems, and assistance to a family member). *Cf. Wilson v. United States Trustee (In re Wilson)*, 125 B.R. 742, 745-46 (W.D. Mich 1990)(substantial abuse where debtor purchased \$1,000 in jewelry within three days of deciding to file bankruptcy and almost \$3,000 in luxuries within ninety days of filing along with ability to repay 32% of unsecured debt in three years); *In re Sanseverino*, 171 B.R. 46, 49 (Bankr. N.D. Ohio 1994)(court, *sua sponte*, despite trustee's recommendation to the contrary, found substantial abuse where debtor with limited income and \$9,193.49 in debts could complete a 70% plan by foregoing \$110 spent monthly on recreation and charitable contributions and from \$30 per month reduction in health insurance; court also found that debtor did not exhibit good faith and complete candor in filing schedules).

For the most part, the cases cited above have interpreted *Krohn* as requiring dismissal based on lack of need alone. At least two courts in this circuit have disagreed. See *In re Adams*, 206 B.R. at 462 (While *Krohn* permits dismissal for ability to repay, standing alone "it does not mandate that result."); *In re Marshalek*, 158 B.R. 704, 708 (Bankr. N.D. Ohio 1993)("[A]n ability to pay, without more, is an insufficient basis to dismiss a case under § 707(b).")(dicta).

weight to the fact that § 707(b) specifically provides a presumption in favor of granting chapter 7 relief to a debtor. See 11 U.S.C. § 707(b) ("There shall be a presumption in favor of granting the relief requested by the debtor."). As noted by one court:

[T]he presumption is in reality a caution and a reminder to the bankruptcy court that the Code and Congress favor the granting of bankruptcy relief, and that accordingly, "the court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present."

Zolg v. Kelly (In re Kelly), 841 F.2d 908, 917 (9th Cir. 1988).

Additionally, this court agrees with the conclusion that "the plain meaning of the term 'substantial abuse' should be acknowledged in interpreting section 707(b)." *In re Adams*, 206 B.R. 456, 462 n.6 (Bankr. M.D. Tenn. 1997)(citing *In re Higuera*, 199 B.R. 196, 199-200 (Bankr. W.D. Okla 1996)). The use of the word "substantial" which means "of ample or considerable amount, quantity, or dimensions," see *In re Higuera*, 199 B.R. at 199, requires not only abuse, i.e., improper treatment or misuse of chapter 7, see BLACK'S LAW DICTIONARY 10 (6th ed. 1990), but "considerable" or "ample" abuse. See *In re Attanasio*, 218 B.R. at 237 (substantial abuse only where "the 'ability to repay' is clear, real and substantial"); *In re Andrus*, 94 B.R. 76, 78 (Bankr. W.D. Pa. 1988)("[P]lethora of interpretations of the

term 'substantial' which uses percentages suggests that the term 'substantial' [has] a quantitative meaning relating to the amount of repayable debt."); *In re Wegner*, 91 B.R. 854, 858 (Bankr. D. Minn. 1988) ("'Abuse' means 'improper use or handling' or 'a corrupt practice or custom'.... [and] '[s]ubstantial' describes the degree of abuse required for dismissal."); *but see In re Keniston*, 85 B.R. 202, 206 (Bankr. D.N.H. 1988) (Finding it inconceivable that by using the word "substantial" to modify the word "abuse", Congress intended a degree of abuse concept, the court "conclude[d] that § 707(b) should be read as simply providing for dismissal of a chapter 7 petition when the court determines that an abuse in fact is involved."); *In re Edwards*, 50 B.R. 933, 936 (Bankr. S.D.N.Y. 1985) (substantial means "real, not seeming or imaginary, that of moment or important"). The evidence in this case falls short of establishing "considerable or ample" abuse.

Finally, not only does the court conclude that substantial abuse has not been established based on "ability to pay" alone, the court also concludes that substantial abuse has not been established when the ability to pay factor is considered with all of the other circumstances in the case. Although the debtor earns more than the poverty level, he is not enjoying an extravagant lifestyle, he has limited assets, there were no eve

of bankruptcy purchases, and there is no evidence that the debtor has sought chapter 7 relief for any reason other than to obtain a fresh start. Granted the court, the United States trustee, and presumably the creditors would prefer the debtor be in a chapter 13 case based on his ability to make some repayment to his creditors. However, this preference, as strong as it may be, is not controlling. Congress established a presumption that a debtor is entitled to chapter 7 relief, not that a debtor should be in chapter 13 if at all possible. In light of this presumption, this court can deny chapter 7 relief to the debtor only if substantial abuse is clearly established. It has not been in this case.

IV.

For the foregoing reasons, an order will be entered in accordance with this memorandum opinion denying the United States trustee's motion to dismiss.

FILED: March 31, 2000

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE